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HIGH COURT OF JUDICATURE CHHATTISGARH : BILASPUR
DIVISION BENCH

CORAM : HON'BLE SHRI H.L. DATTU, CJ &
HON'BLE SHRI V.K. SHRIVASTAVA, J.

Civil Revision No.165 of 2006

APPLICANT Sajan Kumar Agrawal, Contractor, aged about 50 years, son of Shri Sitaramji Agrawal, resident of Main road, janjgir, Distt.Janjgir Champa CG

Versus

RESPONDENTS

1) State of Chhattisgarh represented by Secretary, Water Resources Department, DKS Bhavan, Raipur (CG)

2) The Superintending Engineer, WRD., Bango Project Circle, Machadoli

3) The Executive Engineer, Water Resources Department, Hasdeo Bango Division, Korba, CG

Present : Shri Prateek Sharma, counsel for the applicant

None for the respondents.

ORAL ORDER
(Passed on 14th March, 2007)

The following oral order of the Court was passed by

Vijay Kumar Shrivastava, J.

This is a revision filed under Section 19 of the Chhattisgarh Madhyastham Adhikaran Adhiniyam, 1983 (henceforth "the Adhiniyam") against the award dated 6-6-2006 passed by Chhattisgarh Madhyastham Adhikaran, Raipur (for short, Adhikaran) in reference petition No.35 of

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2005 whereby an award of Rs. 8, 01,123/- a part of his claim has been passed in favour of the applicant and rest of his claim was refused.

2) Work contract for re-modelling and construction of cement concrete lining in between reaches R.D. 3700 to 5650 M and R.D. 7565 to 8000 M of Hasdeo Right Bank Canal was executed in terms of the tender. Period for completion of the work was 12 months including rainy season. The work order was issued on 15-2-1988. Applicant could not complete his work in the stipulated period, but was allowed to continue the work, he completed the work on 31-1-1992. Applicant was not given lay-out in time, from July to October, water continued to flow from the Canal. Let-out of water by NTPC in the Right Bank Canal disrupted the applicant's work. On 5-3-1988 and 14-4-1988 sudden release of water broke the bunds constructed by the applicant. Applicant was instructed by SDO on 10-9-88 to provide CNS layers, but extra rate was sanctioned on 16-5-1989. Applicant executed more than 30% of the earth work. Applicant claimed Rs.60/- per cum, however, the Chief Engineer has sanctioned rate of Rs.47.50 per cum. In payment of running bills delay was caused by the department. Applicant claimed Rs.10,86,327/- for loss of profit and overheads, Rs.4,68,095/- as escalation, Rs.2,19,072/- for non-payment of his work, Rs.3,91,158/- for de-watering, Rs.2,62,261/- as break of bunds, Rs.4,61,077/- for extra item, Rs.1,81, 465/- of security deposit and Rs.8,28,752/- towards interest.

3) Non-applicants contested the claim by filing their detailed reply wherein it is stated that applicant is not entitled

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for his various claims. Learned Tribunal heard both the parties and appreciated the evidence adduced by both the parties and passed the award as above.

4) We have heard learned counsel appearing for the applicant.

5) Section 19 of the Adhiniyam is reproduced below:

> "19. **High Court's power of revision** .-(1) The High Court may suo motu at any time or on an application made to it within three months of the award by an aggrieved party, call for the record of any case in which an award has been made under this Act by issuing a requisition to the Tribunal, and upon receipt of such requisition the Tribunal shall send or cause to be sent to that Court the concerned award and record thereof.
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> (2) If it appears to the High Court that the Tribunal-
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> (a) has exercised a jurisdiction not vested in it by law; or
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> (b) has failed to exercise a jurisdiction so vested; or
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> (c) has acted in exercise of its jurisdiction illegally, or with material irregularity; or
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> (d) has misconducted itself or the proceedings; or
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> (e) has made an award which is invalid or has been improperly procured by any party to the proceedings-
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> the High Court may make such order in the case as it thinks fit.

(3) The High Court shall in deciding any revision under this section exercise the same powers and follow the same procedure as far as may be, as it does in deciding a revision under Section 115 of the Code of Civil Procedure, 1908 (No.5 of 1908).

(4) The High Court shall cause a copy of its order in revision to be certified to the Tribunal.

Explanation- For the purposes of this section, an award shall include an 'interim' award."

From bare reading of the above provision, it is evident that High Court may interfere with the award only in case of any of the conditions as enshrined in the above provision, are found present in the matter.

6) Applicant has put forth grounds in his revision petition. The grounds as enshrined in the petition are attempt to challenge the findings of the award. No where in the revision petition applicant alleges any of the allegations as enshrined in Section 19 of the Adhiniyam. We are not sitting over as an appellate authority to hear and put our decision on the factual aspects of the award and its finding by re-appreciating the material filed before the Tribunal. We have only to consider whether the award suffers from any of the dent as mentioned in the above provision.

7) To appreciate whether the award passed by the Tribunal falls within any of the grounds as enshrined in Section 19(2) of

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the Adhiniyam. We have gone through the award. Relevant portion of the award is reproduced.

> "11. We have heard learned counsel for the parties and have carefully perused the record. Petitioner Sajan Kumar Agrawal in his affidavit has referred his documents and stated that the details of accounts produced by respondents are defective. It has further been submitted that in spite of his different applications (Ex.P-17, P-18, P-34, P-41,P-42 & P-43) for extension of time, no orders were passed by the respondents and no rates of extra item were also settled by the department. No notice was served for recovery of any amount from him in absence of which the department is estopped from claiming the same. In his cross-examination the petitioner has admitted that before submitting his tender he had fully made himself conversant with the nature of work. He was also awarded separate tender for construction of bund situated below the cross regulator of the NTPC Canal. Subsequently he had to face the seepage of water from NTPC cross regulator.
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> 12. It has further been admitted by the petitioner in para 39 of his cross-examination that under clause 4 (a) of the Special Condition it was his responsibility to erect coffer dam, diversion and piping etc. at his own cost. However, the insistence of the petitioner is that he is not liable for the seepage or release of water from the NTPC cross regulator. He was not sure as to when he has submitted his construction programme. In para 42 he was also made to admit that up to 30% of the work of excavation he was to be paid at the agreemented rate while the remaining extra work at the mutual agreed rates. He has also

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admitted payment of running bills but what is disputed is that they were not paid in time. No royalty was paid by him to the Collector. In his subsequent affidavit dated 24.01.1998 the petitioner has submitted that the royalty was paid by him of which 128 receipts are being produced. Similarly 19,000 MT cement bags were sold by him to the authorized agent, certificate to that affect have also been filed. The expenses of de-watering were entered in the de-watering register (Article-A to D). He has also maintained separate register (Article-E) for the monthly expenses with regard to the staff employed for the purpose of this work.

13. R.K.Verma the then S.D.O. who looked after this work from 27.07.1987 to 06.11.1993 has stated in his affidavit that no construction programme was submitted by the petitioner despite various reminders. Out of the work of 52.09 lakhs during 8 months period the petitioner could only work for Rs. 8.50 lakhs. The petitioner could not maintain the proportionate progress in the work and his planning and work were very slow. Under clause 32 A of the agreement the price escalation clause was not acceptable. The petitioner was fully aware of the site conditions and leakage water through cross regulator of NTPC while quoting the rates. There was delay of 24 months in completion of the work, however, under clause General Condition No. 50 the petitioner was allowed to continue the work without any penal clause. The department had constructed a cross bund at R.D. 3620 M for the leakage of water through NTPC cross regulator which was an obvious feature. So far as the CNS layer is concerned, the extension of time was already recommended and he was asked to continue his work. Prolonging of Khariff irrigation is also an obvious feature. So far as the Rabi irrigation during season of 1990-

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91 in any kind of problem in all eventualities are considered by the contractor while quoting the rate.

14. Shri R.K.Verma the then S.D.O. in his affidavit has further corroborated that it was known to the petitioner that the NTPC Project and its activities could not be stopped in the national interest and the leakage of water through the cross regulator was an obvious and common feature. Further in chapter 6 of specifications all machinery work of canal, at page 40 under clause 4 of nature of functions were also well known to the petitioner, therefore this kind of complaint does not hold good. The work of CNS layer is an extra item for which payment was made and the petitioner had never raised any objections at that time. Similarly the petitioner had received payment for complete items including collection of material, laying, consolidation and dressing etc. The petitioner is not entitled for any extra claim for de-watering as it was not an extra item as per agreement. The bunds have to be constructed by him at his own cost. Excavation in all types of soils has already been submitted to the government which can be paid after receiving sanction, however, he has already been provisionally paid for 75% of the work on this count.

15. Similar affidavit has also been submitted on behalf of Rao Balraj Singh the then Executive Engineer, however, he has no knowledge regarding final bill of the petitioner. He has also admitted that the cost of seepage of NTPC water was due to mistake in cross regulator for which a bund was erected. This fact was well known in advance to the petitioner. The petitioner was separately awarded a contract for de-watering the leakage water. He has admitted in his cross examination that during rainy

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period no desired progress in the work could be made due to rise of water level in the canal. He has also admitted that no final decision was taken with regard to extension of time applied by the petitioner.

16. General Condition clause 9 of the petitioner's agreement (Article-A) provides that recovery of the sums advanced may be deducted from the contractor's bill in the suitable percentage of the billed amounts. General condition No.18 (h) makes it clear that the contractor shall be responsible for the correct setting out of all works at his cost and he shall execute the work to alignment, grade and levels as shown in the drawings and as directed by the Executive Engineer and shall check these at frequent intervals. Clause 19 of the General Condition is of paramount importance for the purpose of this case which makes it clear that it shall be the responsibility of the contractor to fully acquaint himself with the nature and the location of works, queries, local conditions and other aspects which are relevant to the work.

17. Here it will be relevant to mention clause 32 of the General Condition which provides that no claim for price escalation on account of any cost whatsoever shall be entertained. Clause 33 of General Condition further makes it clear that if for any reasons the contractor or his authorized agent is not available and work was suspended to avoid recording of measurements, the department shall not entertain any claim from the contractor for any loss incurred by him on this account, provided that the contractor was served 3 days notice in advance. The contractor shall submit his bill of the work done, to the Executive Engineer on or before 10th day of each month. The Executive Engineer shall verify the bill and arrange for admissible

payment as far as possible within 10 days of its presentation, after deducting from it all the amount as per terms of the contract.

18. Clause 36 A of the General Condition makes provision for royalty charges the amount of which shall be refunded by the Collector according to the procedure prescribed in this behalf. Clause 38 of General Condition also provides that the contractor shall at his own expenses arrange for the safety in his operation as required including the provision in the Safety Manual of the Central Government.

19. Clause 45 of the General Condition prescribes the procedure to be followed in case of termination of the contract by the employers. Where the contractor neglect or fails to proceed with the work with due diligence or he violates any of the provisions of the contract, the Executive Engineer may give a 14 days notice identifying deficiencies in performance and demanding corrective action. After such notice the contractor shall not remove from the site, any plant, equipment and materials. If the contractor fails to take satisfactory corrective action within 14 days after receipt of the notice, the Executive Engineer will terminate the contract in whole or in part.

20. Clause 50 of the General Condition of contract deals with extension of time and provides that time shall be considered as the essence of the contract. If, however, the failure of the contractor to complete any work as per the stipulated dates, referred to above, arises from delays on the part of the government in supplying the material or equipment, it has undertaken to supply under the contract or from delay in handing over sites or from increases in the quantity of work to be done under the contract, or force-majure, an appropriate

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extension of time will be given. The contractor shall request such extension within one month of the cause of such delay and in any case before expiry of the contract period.

21. In so far as delay in layout is concerned, it depends on submission of work plan by the contractor as well. In case of Jagjeet Singh Vs. State of Madhya Pradesh and Others , reported in 1997 ATLR 62 where layout was given within the preparatory period of 30 days, it was held that it cannot be said to be of unreasonable delay. In case of P.C.Vajpai Vs. State of Madhya Pradesh & Others, reported in 1998 Arb. W.L.J. 58 it has further been clarified that supply of design and drawings at one time is not necessary. It may be partly supplied, so as not to hinder the work. Now, in so far as the present case is concerned, the petitioner had started raising the demands of layout without submitting any work plan, while the department by letter dated 27.10.1990 (Ex.D-9) & 16.02.1989 (Ex.D-11) had asked the petitioner to submit the work plan and to expedite the progress of work. It is only thereafter, that the petitioner submitted his work plan through letter dated 22.09.1990 (Ex.P-37). The petitioner after submission of the work plan was never again heard to complain about non-supply of any layout. Thus the department was not at fault insofar as the layout is concerned.

22. The contractor/petitioner has laid much stress on the complaint of leakage from cross regulator and excess flow of water by NTPC in the surplus channel. The work was further obstructed by release of water in Canal for Kharrif and Rabi irrigation purposes. The reply of department, in this respect was two fold. First, the contractor was well aware of all these factors which

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were of obvious regular features and, secondly, the contractor was slow in progress of work and did not care to complete the work within stipulated period of contract. Why did he allowed time to pass without completion of work and waited for the natural eventualities to take place? Even otherwise as per special condition 4(a) of the agreement the contractor had to arrange for diversion bunds, dewatering and channels at his own cost and therefore cannot hold the department responsible for loss, if any, suffered on account of such happenings. In the circumstances, in our considered opinion the petitioner is not entitled to be compensated for any loss suffered by him on account of breach of bunds and dewatering.

23. The department in its reply (Ex.P-21) of the final notice of contractor had, however, admitted prolongation of Kharif irrigation. It has also accepted Rabi irrigation in the year 1990-91. In our opinion, therefore although there was initial delay on the part of the contractor, but his continuous filing of applications for extension of time was forwarded for sanction to the higher authorities without proposing any penalty and he was also allowed to continue the work in anticipation of the formal grant of extensions, therefore, the department is estopped from raising the plea that the contractor has to suffer for every loss for the reasons, which he could not be expected to anticipate in advance. The petitioner therefore in our opinion is entitled to claim infructuous overheads to the extent found proved.

24. Insofar as escalation of price is concerned, it has been denied in the agreement itself. The law is well settled on this point. In case of R.R.Agrawal Vs, Government of Madhya Pradesh and Others,

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reported in 1994 ATLR 57 it has been observed that where the escalation clause does not exist or is scored out nothing is payable on account of escalation during the original contract period. In case of Continental Construction Co. Vs. State of Madhya Pradesh, reported in AIR 1988 SC 1166 it has been held that when there is not only absence of escalation clause but there is also prohibition to the giving of escalation in the agreement, the contractor cannot be given any escalation.

25. Since it is an admitted fact that the petitioner was awarded two other contracts in the same vicinity, in the circumstances it has been held in case of Jagdish Kumar Sahita Vs. State of Madhya Pradesh & Others reported in 1993 ATLR 161 and M/s. Ferro Concrete Co. Vs. State of Madhya Pradesh, reported in 1993 ATLR 348 that the question of suffering any loss of labour and idling of machines and plant does not arise.

26. Regarding delay in making payment, it has been observed in case of Anshuman Shukla Vs. M.P.S.T.D.C. reported in 1995 ATLR 229 that every delay in making payment of running bills cannot cause hindrance to the contractor as this element of delay is an inbuilt element in the execution of a Works Contract, which involves multifarious activity by both the parties and, therefore, a routine delay or casual delay shall not be guiding factor. In the present case the department has filed a list of 19th running bills (Ex.P-56) which were paid to the contractor, indicating that no abnormal delay was caused in the payment.

27. Regarding infructuous overheads and profits, we may from the facts and circumstances of this case conveniently gather that contractor himself to be blamed

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for the delay and contributed to the delay in completion of the work. In such a situation, the Madhya Pradesh High Court in case of State of Madhya Pradesh Vs. Mathura Madnani (C.R. No. 479/90, order dated 22.03.1995) reduced the overheads, 50% payable to the contractor. Since there was no curtailment in the work, it has been held in case of M/s. Jivan Lal Jain Vs. Madhya Pradesh Graha Nirman Mandal reported in 1997 ATLR 50 that there is no question of contractor to have suffered any loss on account of future profits.

28. The claim for extra item has not been totally denied by the respondents. The case for finalizing all rates for extra items of earth work is said to be pending with the Government, however, during pendency of the case, the proposed final bill (Article-H) has been filed on 16.09.2002. This final bill is still in-complete in the sense that the necessary deductions of Rs. 46,132/- were not made. After calculating the payment of extra rates of Rs.47.60 per cum and the provisional amount already paid to the Contractor Rs.4,38,520/- still required to be paid to the Contractor under the final bill. Rs.44,000/- deducted from the 19th running bill has also been adjusted in this final bill.

29. Regarding payment for the work done but not paid, the petitioner maintains that he had attended the site on 08.04.1992 but no final measurements were recorded by the S.D.O. in absence of necessary directions form the higher authorities. This has been denied by the department, because the contractor had failed to turn up on the site and did not accept the final measurement recorded in his absence, despite the notices (Ex. D-13, 14 & 15) issued to him. In the circumstances the petitioner is now bound to accept the final measurements recorded in his absence and had lost any right to

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challenge the same. Since the final bill includes all the quantity of work as well as the rate of agreed extra items, the petitioner is not entitled to claim any other item under the head extra-item or the work done but not paid.

30. Although the petitioner has claimed interest at the rate of 18% from the date of notice 17.08.1992, however, in our opinion the rate of bank interest during the last few years, have considerable slipped quite low and since the delay in completion of work is not attributable to the department, the rate of interest deserves to be allowed is Rs.6% per annum. It has been observed in case of Pandey Construction Company Vs. State of Madhya Pradesh and Others), reported in 1998 (1) Raj 349 by the M.P. Arbitration Tribunal, that under the provision of Section 3(1)(8) of the Interest Act antelite interest can be allowed on the amount wrongfully withheld from the date of demand notice. Since in the instant case the department took un-necessary long period in settling the claim of the petitioner he is entitled to claim not only antelite interest but also the interest pendant lite, subject to, however, raising the same from the date of award till its realization at the rate of Rs.12% per annum.

31. To conclude, for the reasons aforesaid, this reference petition is partly allowed and it is directed that the petitioner is entitled to 50% of the loss of overheads, that is approximately Rs.1,81,138/-, Rs.4,38,520/- of the final bill including the amount of work done and extra rates and Rs.1,81,465/- as refund of security deposit, total Rs.8,01,123/- together with interest on this amount from 17.08.1992 at the rate of 6% per annum and further Rs.12% per annum from the date of award till its realization. In facts and circumstances of the case

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there is no order as to costs which shall be born by the parties themselves".

8) From going through the above portion of the award, it is manifest that the Tribunal very minutely considered documents and evidence and clauses of the agreement and after conspicuous appreciation of the material gave its finding and partly allowed the claim of the applicant.

9) We are of the considered view that the Tribunal did not exercise the jurisdiction not vested in it by law or failed to exercise its jurisdiction. The Tribunal did not misconduct itself or proceedings. The award passed by the Tribunal does not suffer from illegality or material irregularity.

10) In the result, we decline to interfere with the award passed by the Tribunal. Accordingly, the revision petition is dismissed. No costs.

11) A copy of this order be certified to the Tribunal.

Sd/- Chief Justice	Sd/- V.K.Shrivastava Judge